No. 91-2015

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

F. JOSEPH LOEPER, ROBERT C. JUBELIRER, D. MICHAEL FISHER, CHARLES LEMMOND, HANK SALVATORE, NOAH WENGER, and MATTHEW RYAN, *Petitioners*,

v.

BRENDA K. MITCHELL, Secretary of the Commonwealth, and WILLIAM BOEHM, Commissioner of the Bureau of Commissions, Elections, and Legislation, Department of State, *et al.*, *Respondents*.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Pennsylvania Supreme Court deny petitioners due process by establishing a deadline for the submission of proposed congressional redistricting plans and excluding certain of petitioners' plans as untimely for failing to meet that deadline?

2. (a) Did the Pennsylvania Supreme Court violate Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, by adopting a congressional redistricting plan that reduced the percentage of African-Americans in Pennsylvania's 2nd Congressional District (Philadelphia) below 65% when the evidence showed that, even with this reduction, the African-American community would continue to be able to elect the candidate of its choice in that district?

(b) Should this Court consider whether the Pennsylvania Supreme Court's plan violated Section 2 with respect to the 1st Congressional District (also in Philadelphia) when petitioners did not assert such a violation in the court below?

(c) Did the Pennsylvania Supreme Court violate Section 2 with respect to the 14th Congressional District (Pittsburgh) by reducing the African-American percentage in that district from 23% to 17% when neither petitioners nor anyone else offered any evidence that this reduction would dilute minority voting strength?

3. Should this Court decide whether the decision of the Pennsylvania Supreme Court improperly ignored the policies of the last legislatively enacted redistricting plan when petitioners never raised this issue in the court below?

4. Did the Pennsylvania Supreme Court misapply this Court's decision in *Karcher* v. *Daggett*, 462 U.S. 725 (1983), by holding that the 0.0111% variance between the populations of the most and least populous congressional districts was justified by a desire to avoid unnecessarily splitting counties and municipalities?

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v.

BRENDA K. MITCHELL, Secretary of the Commonwealth, and WILLIAM BOEHM, Commissioner of the Bureau of Commissions, Elections, and Legislation, Department of State, *et al.*, *Respondents.*

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

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BRIEF IN OPPOSITION

Respondents oppose the petition for a writ of certiorari to the Supreme Court of Pennsylvania.[1] For the reasons

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[1] This opposition is being filed on behalf of the following respondents: (a) Brenda K. Mitchell, Secretary of the Commonwealth of Pennsylvania, and William Boehm, Commissioner of the Bureau of Commissions, Elections, and Legislation (the "Mitchell Respondents"); (b) State Senators Robert J. Mellow, J. William Lincoln, Leonard J. Bodack, Michael A. O'Pake, Patrick J. Stapleton, Jeanette F. Reibman, Vincent J. Fumo, and H. Craig Lewis (the "Mellow Respondents"); and (c) Albert Swann, the Frederick Douglass Society, the Philadelphia Leadership Conference, and State Representatives Harold James, Vincent Hughes, Anthony Williams, and Curtis Thomas (the "Douglass Respondents").

described below, the petition should be denied and the judgment of the Pennsylvania Supreme Court left undisturbed.

STATEMENT OF THE CASE

This case involves the reapportionment of Pennsylvania's congressional districts. Petitioners, who are members of the Pennsylvania Senate and House of Representatives, seek review of a judgment of the Pennsylvania Supreme Court adopting a congressional redistricting plan for the Commonwealth. Respondents include (a) the officials with statutory responsibility for administering elections in Pennsylvania (the Mitchell Respondents), (b) the State Senators who advocated the adoption of the plan chosen by the Pennsylvania Supreme Court (the Mellow Respondents), and (c) certain individuals and groups that intervened on behalf of African-American voters in Philadelphia (the Douglass Respondents).

During the 1980's, Pennsylvania had 23 congressional districts. Appendix to the Petition for a Writ of Certiorari ("App.") at A18; *see* Pa. Stat. Ann. tit. 25, § 3571 (reprinted in App. at A117-A127) (describing the counties and census units within each district). As a result of population shifts, however, Pennsylvania's congressional districts had become substantially unequal in population by 1990, and the Commonwealth had also "lost" two congressional seats. App. at A2, A19. Thus, the Pennsylvania General Assembly faced the task of devising a reapportionment plan containing 21 districts of equal population in order to comply with this Court's decision in *Wesberry* v. *Sanders*, 376 U.S. 1, 7-8 (1964), which held that, as nearly as is practicable, congressional districts within a State must have the same number of people (the "one person, one vote" requirement). Unfortunately, the General Assembly was unable to enact a redistricting plan. App. at A2.

On January 28, 1992, the Mellow Respondents filed an equity action against respondents Mitchell and Boehm in the Commonwealth Court of Pennsylvania, which has jurisdiction over election law disputes. App. at A2; *see* 42 Pa. Cons. Stat. Ann. § 761. Noting that February 18, 1992, the last day for congressional candidates to file nomination petitions, was fast approaching, the Mellow Respondents asked the Commonwealth Court to declare the existing congressional apportionment law (Pa. Stat. Ann. tit. 25, § 3571) unconstitutional; to enjoin the implementation of the official congressional election schedule until a valid plan could be adopted; and to adopt a valid reapportionment plan if the General Assembly remained unable to do so. App. at A2.

At the same time, the Mellow Respondents also applied to the Supreme Court of Pennsylvania to take plenary jurisdiction of the matter. App. at A3; *see* 42 Pa. Cons. Stat. Ann. § 726 (Supreme Court "may, . . . upon petition of any party, in any matter pending before any court . . . of this Commonwealth involving an issue of immediate public importance, assume plenary jurisdiction of such matter at any stage thereof and enter a final order or otherwise cause right and justice to be done").

Senior Judge Barry of the Commonwealth Court held a hearing and granted a preliminary injunction on January 30, 1992, holding that the existing 23-seat apportionment plan was unconstitutional and enjoining the further use of this plan and the implementation of the congressional election schedule. App. at A2, A100-A101. The evidence presented at the preliminary injunction hearing demonstrated that it was critical for the Commonwealth to hold its primary on the scheduled date of April 28, 1992.[2] The evidence also demonstrated that the boundar-

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[2] The evidence showed that the Commonwealth had planned a "unified" primary (*i.e.*, one in which presidential and State legislative candidates as well as candidates for Congress would stand for

ies of Pennsylvania's congressional districts had to be fixed well in advance of that date in order for the primary to take place in timely fashion.[3]

Judge Barry's order required all parties and intervenors, if any, to submit their proposed reapportionment plans to the Commonwealth Court no later than February 11, 1992. App. at A2, A101. His order also provided notice that the court would proceed to select a plan if the Legislature failed to enact a redistricting plan by February 11, 1992. App. at A2, A101. Petitioners never sought an extension of these deadlines.

On or before February 11, pursuant to the Commonwealth Court's order, the Mellow Respondents submitted three plans, known as Plaintiffs' Plans 1, 2, and 3. App. at A3. (Plaintiffs' Plan 3 was later withdrawn. App. at A3.) On or before February 11, numerous other parties moved to intervene and offered plans of their own. App. at A3, A20-A21. The intervenors included petitioners, who submitted a plan known as "Loeper Original" or "Loeper 1." App. at A21; Petition for a Writ of Certiorari

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election) and that, if congressional districts were not drawn in time for the primary, the Commonwealth would either have to postpone the entire primary (thereby decreasing Pennsylvania's influence on the presidential nominations) or hold a separate congressional primary (thereby resulting in additional costs to the Commonwealth of $5-6 million). *See* Respondents' Appendix ("Res. App.") (attached hereto) at 8a-9a.

[3] Until congressional district lines had been drawn, the Secretary of the Commonwealth, the 67 county Boards of Election within the Commonwealth, and the candidates themselves could not begin taking the many steps necessary to prepare for elections. These steps included the circulation by candidates of nomination petitions, the filing of completed petitions with the Secretary of the Commonwealth, the filing of challenges to such petitions, the resolution by the Commonwealth Court of such challenges, the final certification of candidates' names, the mailing of absentee ballots to military voters stationed outside the Commonwealth, and the printing and mailing of ballots and labels for voting machines. *See* Res. App. at 6a-8a.

("Pet.") at 4. Among the other intervenors were the Speaker of the Pennsylvania House of Representatives and other members of the House leadership, who proposed two plans (App. at A20), a group of 11 members of Congress, who submitted a single plan (App. at A20-A21), respondent Harold James (one of the Douglass Respondents), who filed a plan on behalf of African-American voters in Philadelphia (App. at A20), and four groups representing regional interests, who offered their views on how the proposed plan affected particular regions (App. at A21). After February 11, other parties sought and were allowed to intervene, including the remaining Douglass Respondents, who intervened on behalf of African-American voters, and petitioner Ryan. App. at A21. Thus, contrary to what petitioners claim (Pet. at 8), a broad range of interests was represented in the Commonwealth Court and the court had before it a wide range of plans from which to choose.

The General Assembly was unable to enact a reapportionment plan by the court's February 11 deadline. App. at A2. Accordingly, on February 12, the Commonwealth Court ordered hearings to begin the next day to consider all proposed plans that had been timely filed on or before February 11, 1992. App. at A2-A3. On February 13, shortly after the hearings began, the Pennsylvania Supreme Court took plenary jurisdiction of the matter. App. at A3, A106. The Supreme Court designated President Judge David Craig as its Master and directed him to report to the Supreme Court by February 26, 1992. App. at A3, A106.

On the first day of the hearings, petitioners submitted two additional plans for the court's consideration. The first was offered by petitioner Ryan, who frankly admitted that he had filed his motion to intervene and his proposed plan on February 12, a day after the court's deadline. Res. App. at 13a. As noted above, Judge Craig allowed petitioner Ryan to intervene, but refused

to permit him to present his untimely plan. Res. App. at 13a.

The second plan was offered by petitioner Loeper and was known as the "Loeper Amended Plan" or "Loeper 2." Petitioners' counsel characterized it as "essentially the plan that we filed on the 11th, with some very minor fine tuning." Res. App. at 12a. The testimony revealed, however, that the Loeper Amended Plan was quite different from its predecessor. The "very minor fine tuning" made by petitioners involved moving hundreds of thousands of people among various districts. Res. App. at 15a-21a. The effect of these changes was to make the proposed districts substantially more equal in population than in Loeper 1 and to alter the racial make-up of the 1st and 2nd Congressional Districts in Philadelphia.[4]

Because these changes had not been offered until after the February 11 deadline, Judge Craig excluded the Loeper Amended Plan as untimely. App. at A22-A23; Res. App. at 22a-23a. Thus, petitioners are simply wrong when they claim that they were "penalized" (Pet. at 6) for attempting to amend their plan. The fact of the matter is that the Loeper Amended Plan was excluded because it was not filed in a timely fashion.

At the hearings, there were two principal issues on the merits: whether the proffered plans satisfied the "one person, one vote" requirement and whether the plans complied with Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, which prohibits redistricting

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[4] The changes lowered the maximum percentage deviation (the key measure of population equality, which is defined as the percentage by which the most populous district exceeds the ideal district population plus the percentage by which the least populous district falls short of the ideal) more than tenfold, from 0.13344% to 0.00954%. App. at A147. These changes also had the effect of increasing the African-American population of the 1st Congressional District from 46.686% to 49.048% while lowering it in the 2nd Congressional District from 68.055% to 65.857%. App. at A147.

plans that deny protected minority groups an equal opportunity "to participate in the political process and to elect representatives of their choice."

On February 24, 1992, Judge Craig issued his "Findings, Recommended Decision and Form of Order" (App. at A16), recommending adoption of Plaintiffs' Plan 2, which had been proposed by the Mellow Respondents. App. at A44. Petitioners and others then filed exceptions to Judge Craig's findings and recommendations with the Pennsylvania Supreme Court (App. at A3, A5), and oral argument was held on Saturday, March 7, 1992. App. at A3.

The Pennsylvania Supreme Court issued a per curiam order on March 10, 1992, adopting Judge Craig's recommendation of Plaintiffs' Plan 2 and dismissing all the exceptions. App. at A3. In an opinion issued on March 26, the Pennsylvania Supreme Court held that Plaintiffs' Plan 2 satisfied the "one person, one vote" requirement. App. at A7. The court reasoned that the plan had a maximum percentage deviation of only 0.0111% (far less than deviations permitted in other recent congressional redistricting cases) and that this deviation was justified by a desire to avoid splitting counties, municipalities, and precincts any more than necessary to comply with the one person, one vote rule. App. at A7. With respect to the Voting Rights Act issue, the Pennsylvania Supreme Court rejected petitioners' claim that the 2nd Congressional District had to be 65% African-American in order to give African-Americans an equal opportunity to elect candidates of their choice. App. at A10-A12. The court held instead that Plaintiffs' Plan 2, which made this district only 62% African-American, nonetheless preserved minority voting strength in the district. App. at A10-A12. Finally, the Pennsylvania Supreme Court held that Judge Craig had acted properly in excluding petitioners' late-filed plans. App. at A14-A15.

SUMMARY OF ARGUMENT

1. The Pennsylvania courts acted entirely properly in setting a deadline for the submission of proposed redistricting plans and in excluding two plans proffered by petitioners after that deadline. The State courts were faced with a consolidated primary election for presidential as well as congressional and State legislative candidates scheduled for April 28, 1992, a date that could not be changed without either costing the Commonwealth substantial sums or reducing the influence of the Commonwealth's voters on the presidential election process. In order for the primary to take place on April 28, 1992, the Commonwealth's election officials needed substantial "lead time," *e.g.*, to allow prospective candidates to familiarize themselves with new district boundaries and circulate nomination petitions, to give State courts adequate time to resolve challenges to such petitions, and to print and distribute regular and absentee ballots. In order to allow time to prepare for the primary as scheduled, the State courts had to have a redistricting plan in place as soon as possible. Consequently, the State courts were fully justified in ordering all parties and prospective intervenors (including petitioners) to submit proposed redistricting plans within a twelve-day time period ending on February 11, 1992. Petitioners never moved to extend this period; instead, they simply disregarded it and submitted a plan late (in the case of petitioner Ryan) or attempted to evade it by mischaracterizing an untimely plan as involving merely technical corrections to a previous, timely filed plan (in the case of petitioners Loeper, *et al.*). Under the circumstances, the State courts acted entirely properly in refusing to admit these untimely plans. Petitioners' arguments to the contrary raise no substantial federal issue.

2. Petitioners' contention that the Pennsylvania Supreme Court failed to make adequate factual findings regarding the effect of its plan on minority voting rights likewise presents no issue warranting review.

a. With respect to the 2nd Congressional District (which is located almost entirely within Philadelphia), petitioners claim that the Pennsylvania Supreme Court failed to justify reducing the African-American percentage in this district below 65% of the total population. Yet, contrary to what petitioners argue, there is no presumption that a district should be 65% African-American in order to enable the African-American community to have an equal opportunity to elect the candidate of its choice. Hence, there is no conflict between the present case and other decisions. Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, commands courts to examine the "totality of circumstances" regarding an allegedly discriminatory districting plan, an approach that requires courts to evaluate carefully the facts of each case instead of assuming that a district must contain a particular percentage of minorities in order to comply with the statute.

b. Petitioners did not argue below that the factual findings regarding the 1st Congressional District (which is also located in Philadelphia) were inadequate; consequently, they may not raise such an argument here. In any event, petitioners have mischaracterized the Pennsylvania Supreme Court's analysis of this district. The Pennsylvania Supreme Court did not hold that African-American majority districts must be created wherever possible. Rather, the court held that the redistricting plans proffered by petitioners and other parties, all of which had lower African-American percentages in the 1st District than the plan chosen by the court, would have diluted minority voting strength. Thus, no conflict exists between the case at bar and cases from other jurisdictions holding that there is no obligation to create African-American majority districts wherever possible.

c. With respect to the 14th Congressional District (which contains Pittsburgh and certain of the surrounding suburbs), petitioners argue that the Pennsylvania

Supreme Court should have made some sort of inquiry to ensure that the reduction in the percentage of African-Americans living in this district (from approximately 23% under the 1982 plan to approximately 17% under the plan at issue here) did not impair minority voting strength. However, petitioners never offered any evidence whatsoever that this reduction would in any way dilute the voting power of the African-American community in this district. Consequently, petitioners' claim that this district violates Section 2 fails for want of proof.

3. Petitioners assert that, in choosing a plan, the Pennsylvania Supreme Court failed to give deference to the district configurations adopted by the Pennsylvania General Assembly in 1982, as supposedly mandated by *White* v. *Weiser*, 412 U.S. 783 (1973). But petitioners did not argue below that the court should adhere to the 1982 district lines to the extent possible, and accordingly they may not rely on that argument here. Even if petitioners had raised the argument below, it does not justify the granting of the petition because the evidence demonstrates that the Pennsylvania Supreme Court's plan did a better job than petitioners' plan of conforming to the 1982 district configurations.

4. Finally, petitioners claim that the Pennsylvania Supreme Court erred in holding that the 0.0111% variance between the populations of the most and least populous districts was justified by the policy of preserving the boundaries of counties and municipalities. According to petitioners, the court was wrong to accept this justification because there is no State constitutional or statutory provision that reflects a policy that counties and municipalities be kept whole to the extent possible in congressional redistricting. What petitioners ignore, however, is that because the Pennsylvania Supreme Court is the highest court in the Commonwealth, its decision is determinative of the question of whether Pennsylvania law recognizes such a policy. Accordingly, petitioners' arguments do not merit the granting of certiorari.

REASONS FOR DENYING THE WRIT

I. NO ISSUE FOR REVIEW IS RAISED BY THE PENNSYLVANIA SUPREME COURT'S DECISION THAT ALL REDISTRICTING PLANS HAD TO BE SUBMITTED TWELVE DAYS AFTER THE COURT'S ORDER AND THAT THE PARTIES WOULD NOT BE ALLOWED TO SUBMIT NEW OR AMENDED PLANS AFTER THAT DEADLINE.

Notwithstanding petitioners' claims that the Pennsylvania Supreme Court's exclusion of their plans was "arbitrary" and "inconsistent with due process" (Pet. at 7, 10), the Pennsylvania Supreme Court's decision presents no issue worthy of review by this Court. The court's order establishing a deadline for submitting plans was entirely consistent with the long-recognized right of courts to control their dockets. *See generally Landis* v. *North American Co.*, 299 U.S. 248, 254-55 (1936). Had petitioners moved for a continuance to enable them to submit new redistricting plans or to offer additional evidence, the granting or denial of their motion would have been within the discretion of the trial judge, and reversal would be appropriate only if the trial judge had abused his discretion or acted so arbitrarily as to violate due process. *See, e.g., Ungar* v. *Sarafite*, 376 U.S. 575, 589-91 (1964); *Fontenot* v. *Upjohn Co.*, 780 F.2d 1190, 1193 (5th Cir. 1986).

An even more stringent standard should apply here, because petitioners never sought such a continuance. Instead, petitioner Ryan unilaterally decided to ignore the deadline and to submit a redistricting plan late. Now, Ryan (and the other petitioners) seek relief from the deadline by arguing that Judge Craig's adherence to the deadline deprived them of a full and fair hearing. The integrity and finality of our judicial process could not endure if every litigant was granted such absolution.

Enforcement of the February 11 deadline and the holding of an expedited hearing were necessary to allow

the court sufficient time to consider all timely filed plans as quickly as possible. Such a speedy resolution was necessary because of the upcoming primary on April 28, 1992, and the Commonwealth's requirement for a significant amount of "lead time" to prepare for it. *See* p. 4, *supra*. As Judge Craig explained:

> All parties have had *many months* to prepare a proper plan.
>
> If the court had opened this time-constrained case to late plans and amendments filed after the February 11 deadline plainly stated in Judge Barry's order, the proceedings would have been endless because (1) new intervenors would have required many new plans to be reviewed, and (2) the earlier parties could have amended their timely plans repeatedly, to surpass the new plans.
>
> . . . .
>
> Exclusion of full consideration of the Ryan Plan was justified because that plan was in existence on and before February 11. There was no reason that the plan could not have been timely presented. It was knowingly withheld from being filed in the court on that date, on the ground that further legislative action then was possible.

App. at A23-A24 (emphasis in original). The Pennsylvania Supreme Court affirmed, holding that

> Judge Craig's rigid adherence to the February 11, 1992, deadline was absolutely correct. The parties complaining had ample notice of the deadline and should have been well aware of its importance as they would be of any statute of limitations or other judicial order imposing a time deadline. Not to adhere to the deadline imposed would create or would have created chaos and we will not countenance such a result.

App. at A14-A15. In short, because petitioner Ryan's proposed plan was untimely, he has no right to complain about its exclusion.

For the same reasons, the Loeper petitioners' assertion that Judge Craig wrongly refused to consider their amended plan is without merit. Indeed, the Loeper petitioners have even less right to relief than petitioner Ryan because they mischaracterized the Loeper Amended Plan to the Master. The Loeper petitioners represented to the court that the amendment only made very minor corrections to their previous, timely filed plan. Res. App. at 12a. In fact, the evidence showed, and the court concluded, that the amended plan was qualitatively different from the original. *See* p. 6, *supra*. Consequently, Judge Craig excluded this plan as untimely (App. at A23), and the Pennsylvania Supreme Court rightfully upheld this ruling. In sum, petitioners simply should not be permitted to cast their mistaken strategy of ignoring the February 11 deadline as a judicial error of constitutional dimensions.

Perhaps sensing the weakness of their argument regarding the deadline, petitioners seek to bolster it by arguing that the combination of the deadline and the expedited hearing before the Master conflicts with other cases that purportedly require "full and fair hearings" when a court adopts a redistricting plan. Pet. at 8. Yet none of the cases on which petitioners rely (Pet. at 8-9) actually addresses the issue of how much time a court must spend considering plans in order to satisfy the Due Process Clause.

In addition to their arguments regarding the exclusion of their plans and the supposedly undue abbreviation of the evidentiary hearing, petitioners also suggest that a "fiduciary duty, similar to that imposed on courts considering class action settlements and school desegregation cases, should be imposed" on courts to "take affirmative steps to obtain all information needed to assure that the plan complies with constitutional, statutory and caselaw requirements." Pet. at 11. In essence, petitioners' fiduciary duty argument represents another desperate at-

tempt to rectify their failure to meet the court's deadline by creating a heretofore unknown procedural requirement for courts to make affirmative inquiries to obtain "*all* information." Pet. at 11 (emphasis added). Obviously such a standard, which would result in endless litigation with an infinite number of plaintiffs and plans, does not exist and should not. In short, petitioners' fiduciary duty argument, like their other arguments regarding the deadline for submitting plans, must fail.

II. NO ISSUE FOR REVIEW IS RAISED BY THE PENNSYLVANIA SUPREME COURT'S DECISION UNDER THE VOTING RIGHTS ACT.

(a) Petitioners contend that the Pennsylvania Supreme Court violated Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973 (reprinted in App. at A116-A117), by reducing the percentage of African-Americans in the 2nd Congressional District (Philadelphia) from 81% to 62% of the total population of the district. Pet. at 11-12. To support this argument, petitioners point to the opposition of the incumbent African-American Congressman to the reduction, the fact that the 62% figure falls short of the 65% "benchmark" that petitioners claim is generally necessary to ensure effective representation of minority voters, and the absence of expert testimony regarding the effect of the reduction. Pet. at 12-13. None of these three points merits review by this Court.

Addressing the last point first, we note that although the Master refused to permit the Mellow Respondents to offer expert testimony, they did offer proof, which was expressly relied upon by the Pennsylvania Supreme Court, that a 62% district would in fact provide African-American voters an opportunity to continue to elect a representative of their choice. App. at A10. We must also note that the incumbent's victory in the April 28,

1992 primary confirms the validity of this finding.[5] Res. App. at 27a.

Second, petitioners' reliance on what they contend is a "generally accepted benchmark" of 65% (Pet. at 12) is misplaced. Section 2, in fact, does not establish any particular percentage as a "benchmark" for safeguarding minority voting strength, but rather requires courts to examine the "totality of circumstances" in determining whether African-Americans have an equal opportunity "to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973. *See Chisom* v. *Roemer*, 111 S.Ct. 2354, 2365 (1991) (all Section 2 claims must allege "an abridgement of the opportunity to participate *and* to elect representatives of one's choice"). As would be expected, this test has resulted in courts approving districts with total populations of African-Americans of less than 65%. *See, e.g., Harrison* v. *Pennsylvania Legislative Reapportionment Commission*, No. C.A. 92-0693, 1992 WL 95909, at *2 (E.D. Pa. Apr. 21, 1992) (upholding legislative reapportionment plan for Pennsylvania State Senate which contained four districts in Philadelphia with less than 62% African-American total population; court reasoned that 65% figure "is not a hard and fast rule, . . . nor is it a statutory requirement"); *Jordan* v. *Winter*, 604 F. Supp. 807, 814 (N.D. Miss.) (per curiam), *aff'd sub nom. Mississippi Republican Executive Committee* v. *Brooks*, 469 U.S. 1002 (1984).[6] Indeed, the very case that petitioners rely upon

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[5] Because the 2nd Congressional District has over 250,000 registered Democrats and only about 50,000 registered Republicans, the incumbent's success in the primary all but assures his re-election. *See* Res. App. at 25a. Moreover, all three of the incumbent's opponents in the general election are African-Americans.

[6] The Department of Justice has explained that

> "the Attorney General has frequently concluded, based on the facts presented in a particular submission, that districts containing a minority population significantly less than 65 percent

(Pet. at 12-13), *Burton* v. *Sheheen*, C.A. No. 3:91-2983-1, 1992 WL 106354 (D.S.C. May 1, 1992), approved districts that were less than 65% African-American.[7]

Here, the Master expressly found that there was no evidence that a 62% African-American district would pose a risk to minority voting strength. App. at A36. On the contrary, as discussed above, the Pennsylvania Supreme Court explicitly found that in this case "a 62% African-American district would suffice." App. at A12. Thus, there is simply no basis here for finding a Section 2 violation based on a so-called 65% "benchmark."

Finally, although the testimony at trial showed that the incumbent would have preferred a district that was approximately 70% African-American and that petitioners included such a district in their plan to "appease" him, Res. App. at 14a, the incumbent's opposition to any reduction of the African-American population in his district hardly evidences a violation of Section 2. To the contrary, as the Pennsylvania Supreme Court held, a desire to protect this incumbent

> does not mandate making the Second Congressional District almost 70% African-American when the result is to dilute African-American voting strength

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of the total are racially fair districts and that the plan submitted is entitled to Section 5 preclearance."

James v. City of Sarasota, 611 F. Supp. 25, 32-33 (M.D. Fla. 1985) (quoting letter of Department of Justice). In *James*, the court held that a district containing a 50.1% African-American total population and a 42.6% voting age African-American population was sufficient for purposes of Section 2, despite the existence of white bloc voting, because minority voter turnout had historically exceeded that of whites in the district. 611 F. Supp. at 27-29.

[7] In fact, even in *Ketchum* v. *Byrne*, 740 F.2d 1398, 1416 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985), the court recommended that the district court consider the "65% figure or some variation of it" only when "reliable, determinative statistics are not available." In this case, because reliable, determinative statistics were in evidence, it was not necessary to look to the 65% figure to insure fairness.

> in the neighboring First District, which is only 46.76% African-American under the Loeper Plan [as opposed to 52.356% under the plan adopted by the court] . . . . Although incumbency protection is not in and of itself an inappropriate consideration, it may not be accomplished at the expense of minority voting potential. *Garza v. County of Los Angeles*, 918 F.2d 763, 771 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 681 (1991).

App. at A12. In short, like petitioners' other arguments regarding the 2nd Congressional District, the incumbent's opposition to the racial composition of this district does not warrant review by this Court.

(b) The Pennsylvania Supreme Court's plan contains an additional district with an African-American majority, the 1st Congressional District, which is also located primarily within Philadelphia and which is 52.356% African-American. Petitioners contend the court's creation of this district was premised on the erroneous assumption that African-American majority districts must be created wherever possible. Pet. at 13-14.

At the outset, it should be noted that petitioners never raised this contention in the court below. *See* App. at A154-A156. Consequently, this issue is not properly presented to this Court for review. *See infra* at 20. Even if petitioners had preserved the point, they are incorrect in asserting that the Pennsylvania Supreme Court created a second African-American majority district in Philadelphia because it believed that "'[w]hen possible, an increase in the number of minority-in-the-majority districts is constitutionally required.'" Pet. at 13 (citation omitted). Although the Master's Findings, Recommended Decision and Form of Order included this language (App. at A34), the Pennsylvania Supreme Court based its decision on an altogether different ground, namely, that "other plans concentrate African-American voters in the Second Congressional District, thereby diluting the voting strength of African-American voters in

the First Congressional District." App. at A12.[8] Consequently, notwithstanding petitioners' claim to the contrary, there is no conflict between the decision of the Pennsylvania Supreme Court and *Quilter* v. *Voinovich*, No. 5:91 CV-2219, 1992 WL 114748 (N.D. Ohio Jan. 31, 1992), *probable jurisdiction noted*, 1992 U.S. LEXIS 3271 (No. 91-1618 June 1, 1992), where the court rejected a *per se* requirement for the creation of minority-in-the-majority districts and found that African-Americans in Ohio had frequently been elected from districts that were less than 50% African-American.[9]

(c) Finally, petitioners contend that the Pennsylvania Supreme Court should not have reduced the African-American population in the 14th Congressional District (Pittsburgh) from approximately 23% to approximately 17% without an affirmative inquiry into the consequences of such a reduction. Even assuming, *arguendo*, that *Armour* v. *Ohio*, 775 F. Supp. 1044 (N.D. Ohio 1991), on which petitioners rely, was rightly decided, petitioners failed to make any showing such as that made in *Armour*. Indeed, petitioners never offered to put forward *any* evidence on this point in the State court proceedings. Consequently, the decision below does not conflict with that of any other court, and this issue, like petitioners'

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[8] In so holding, the Pennsylvania Supreme Court relied on this Court's statement in *Thornburg* v. *Gingles*, 478 U.S. 30, 46 n.11 (1986), that "Dilution of racial minority group voting strength may be caused by the dispersal of blacks into districts in which they constitute an ineffective minority of voters or from the concentration of blacks into districts where they constitute an excessive majority." App. at A12.

[9] Petitioners also contend that the Pennsylvania Supreme Court had no evidence before it that a 52.356% majority of African-American voters in the First District would be "effective." Pet. at 13-14. This argument ignores the testimony that such a percentage of African-American voters in this district would, in fact, give African-Americans the opportunity to elect candidates of their choice. App. at A9.

other Section 2 claims, does not merit review by this Court.

III. PETITIONERS HAVE WAIVED THE ARGUMENT THAT THE PENNSYLVANIA SUPREME COURT ERRONEOUSLY FAILED TO DEFER TO THE POLICIES REFLECTED IN THE LAST LEGISLATIVELY ENACTED REDISTRICTING PLAN; BUT EVEN IF THEY HAD NOT WAIVED IT, THE ARGUMENT DOES NOT WARRANT REVIEW BY THIS COURT.

(a) Petitioners next argue that the Pennsylvania Supreme Court erred by failing to give deference to the policy choices reflected in the last legislatively enacted redistricting plan (*i.e.*, Pa. Stat. Ann. tit. 25, § 3571, which was enacted in 1982). In particular, petitioners claim that the Pennsylvania Supreme Court's plan "broke up" a "community of interest" in Allegheny County (which comprises Pittsburgh and its suburbs) that had been "recognized, and embodied as a legislative policy, in the previous redistricting statute." Pet. at 18. Petitioners failed to make this argument in the court below, however, and consequently they cannot raise it here.

Because petitioners seek review of a State court's judgment, they are required by Rule 14.1(h) of this Court to specify "the stage in the proceedings . . . at which the federal questions sought to be reviewed were raised . . . ." In an effort to satisfy Rule 14.1(h), petitioners cite to the exceptions they filed in the Pennsylvania Supreme Court protesting the Master's recommended decision. Pet. at 5, citing App. at A150-A158. Yet nowhere in these exceptions did petitioners contend that the Master should have adhered more closely to the district boundaries devised by the General Assembly in 1982. Instead, petitioners asserted only that the Master had

> (a) improperly excluded their proposed plans (App. at A150-A153, A157-A158),

(b) failed to make adequate findings of fact regarding protection of minority voting rights in the 2nd and 14th Congressional Districts (Philadelphia and Pittsburgh) (App. at A154-A156),

(c) employed the wrong legal standard by "engag[ing] in a wide-ranging balancing of many factors" rather than selecting a plan that "approached equality of population as nearly as practicable while also protecting constitutional and statutory voting rights" (App. at A156),

(d) chosen a plan with "an unacceptably high deviation from equal population" (App. at A156), and

(e) adopted a plan with mathematical errors and a discontiguous district (App. at A157).

Although petitioners also argued that the plan chosen by the Master violated communities of interest in Allegheny County (App. at A157), they never claimed that the Master thereby failed to give deference to the 1982 districting plan. To the contrary, petitioners' position below was that the 1982 plan contained a gerrymandered 4th Congressional District and that one of the supposed virtues of their proposed plans was that they "correct[ed]" this gerrymander. Res. App. at 24a. Thus, far from arguing that the 1982 plan warranted deference, petitioners actually took the opposite position in the court below. *See also infra* at 21 (describing other instances where petitioners' plan failed to follow the 1982 district lines).

In short, petitioners never argued below that the Pennsylvania Supreme Court should have adhered to the 1982 district boundaries to the extent possible in fashioning a redistricting plan. Consequently, petitioners should not be permitted to assert that argument here. *See, e.g.*, *Clark* v. *Jeter*, 486 U.S. 456, 459-60 (1988); *Bankers Life & Casualty Co.* v. *Crenshaw*, 486 U.S. 71, 76-80 (1988); *Board of Directors of Rotary International* v. *Rotary Club*, 481 U.S. 537, 549-50 (1987); *Heath* v. *Alabama*, 474 U.S. 82, 87 (1985).

(b) Even if petitioners had properly preserved their argument regarding deference to the 1982 plan, it still does not merit the granting of certiorari. Assuming, *arguendo*, that the Pennsylvania Supreme Court was required to defer to the policy choices reflected in the 1982 plan, the record shows that, in fact, it did so.

The Master's undisputed findings demonstrate that, overall, the Pennsylvania Supreme Court's plan did a better job than any of the other plans (including those offered by petitioners) of preserving the communities of interest recognized by the General Assembly in the 1982 plan. For example, under the 1982 plan, Berks and Schuylkill Counties were placed together in the 6th Congressional District (App. at A120), and the Master explicitly found that these counties "share a community of interest in a common economic base, in circulation arteries, and schools of higher education as well as other matters." App. at A38. Plaintiffs' Plan 2, the plan adopted by the Pennsylvania Supreme Court, keeps these two counties together; the Loeper Plan did not. App. at A39. Similarly, the 1982 plan placed North Middleton Township and the Borough of Carlisle together with similar communities in the 9th Congressional District. App. at A39, A125-A126. Once again, the Master found that Plaintiffs' Plan 2 "maintain[s] that relationship," while the Loeper Plan did not. App. at A39.

Having heard testimony on these and other "community-of-interest" claims asserted by representatives of various regions of the Commonwealth, the Master found that "The Plaintiffs' Plans 1 and 2 are the only plans which substantially satisfy all of the regional concerns." App. at A39. Petitioners have never challenged this finding. Thus, even if the Pennsylvania Supreme Court was required to choose "which of the plans before it was most consistent with the existing congressional reapportionment statute" (Pet. at 17), the undisputed facts demonstrate that the court did just that. Accordingly, there is

no need for this Court to review the question of deference to the 1982 plan.

IV. THE PENNSYLVANIA SUPREME COURT CORRECTLY HELD THAT THE POLICY OF PRESERVING COUNTY AND MUNICIPAL BOUNDARIES JUSTIFIED THE PLAN'S MINOR DEVIATIONS FROM POPULATION EQUALITY.

This Court has held that congressional districts within a State must have equal populations. *Wesberry* v. *Sanders*, 376 U.S. 1, 7-8 (1964). The Court has recognized, however, that "[p]recise mathematical equality . . . may be impossible to achieve in an imperfect world," *Karcher* v. *Daggett*, 462 U.S. 725, 730 (1983), and consequently has required only that "districts be apportioned to achieve population equality 'as nearly as is practicable.'" *Id.* at 736 (citation omitted).

In this case the redistricting plan adopted by the Pennsylvania Supreme Court has a total maximum deviation of only 0.0111%. To determine whether this deviation satisfies the "one person, one vote" standard, this Court has established a two-part test. *Id.* at 730. First, the party challenging a redistricting plan must show that "the population differences among districts could have been reduced or eliminated altogether by a good-faith effort to draw districts of equal population." *Id.* The mere fact that a smaller population deviation was possible, however, does not render a plan *per se* unconstitutional. *Id.* at 740. Rather, the existence of plans with smaller deviations simply obligates a court to apply the second part of the test, *i.e.*, to determine whether the proponent of the plan has shown that "each significant variance between districts was necessary to achieve some legitimate goal." *Id.* at 731. Among the possible "legitimate state objective[s]" identified by the Court in *Karcher* were "making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoid-

ing contests between incumbent Representatives." *Id.* at 740.[10]

Petitioners argue that the Pennsylvania Supreme Court wrongly assumed that the permissible State objectives enunciated by this Court in *Karcher* were *per se* justifications for the deviations in the Pennsylvania Supreme Court's plan. Pet. at 20. Petitioners further claim that the Pennsylvania Supreme Court should have identified some State constitutional or statutory provision to support the conclusion that the need to preserve county and municipal boundaries justifies the deviations at issue here. Pet. at 20. Petitioners thus concede that the issue of whether Pennsylvania recognizes a desire to preserve county and municipal boundaries as a justification for population deviations in a redistricting plan is a question of State law.

What petitioners ignore, however, is that the Pennsylvania Supreme Court is fully competent to decide that Pennsylvania law favors preservation of counties and municipalities. Indeed, this Court has long recognized

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[10] Numerous courts have upheld plans with larger total maximum deviations than that at issue in this case as a result of one or more of these factors. *See, e.g., Turner* v. *Arkansas*, 784 F. Supp. 585, 588 (E.D. Ark. 1991) (0.73% deviation achieved the legitimate State objective of attempting, to the extent possible, to keep counties and voters in the same district to which they had been assigned under the prior redistricting plan); *Stone* v. *Hechler*, 782 F. Supp. 1116, 1126-27 (N.D. W. Va. 1992) (per curiam) (deviation of 0.09% served goals of preserving the cores of previous districts and maintaining district compactness; court reasoned that "the smaller the population deviation, the greater the importance of the State's interests, and the more consistently the plan as a whole reflects the State's interests, the smaller the State's burden of proof."); *Wilson* v. *Eu*, 1 Cal. 4th 707, 823 P.2d 545, 552, 4 Cal. Rptr. 2d 379 (1992) ("the need to form reasonably compact districts, to use census tracts rather than blocks in forming districts . . . and to comply with the Voting Rights Act" justified a maximum range in the congressional plan of 0.25%).

that "the courts of a State have the supreme power to interpret and declare the written and unwritten laws of the State." *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 680 (1930). It is therefore completely inappropriate for petitioners now to ask this Court to substitute its judgment for that of the Pennsylvania Supreme Court on this State law issue.[11]

Finally, petitioners try to suggest that the Pennsylvania Supreme Court wrongly applied to this case the standards for evaluating a legislatively enacted congressional plan instead of the supposedly more stringent standards for evaluating court-adopted congressional plans. Contrary to petitioners' argument, however, no such distinction exists. Both *Karcher*, 462 U.S. at 730 (reviewing a legislative plan), and *White* v. *Weiser*, 412 U.S. at 790 (reviewing a judicially adopted plan), permit only those population variances among congressional districts that "are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown." Consequently, petitioners do not present any issue for this Court to review.[12]

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[11] Nothing in *Karcher* changes the rule that State Supreme Courts have the power to articulate State policy. The reference in *Karcher* to "legislative policies" as justifying deviations stems from the fact that the plan at issue there was a legislatively enacted one.

[12] Petitioners also complain that the goal of not splitting municipalities was not "consistently and uniformly applied" and that "while there were no municipal splits in western Pennsylvania, there were numerous municipal splits in eastern Pennsylvania." Pet. at 20-21. The reality is that there had to be some splits in the eastern part of the Commonwealth because it is more densely populated than the western part. Petitioners similarly argue that the Pennsylvania Supreme Court plan is inconsistent in regard to protecting communities of interest. Notwithstanding petitioners' claim, the Master found that the plan did a better job of respecting communities of interest than any other plan and petitioners never challenged this finding. App. at A44.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

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APPENDIX

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 25 M.D. Misc. 92

ROBERT J. MELLOW, Senator, 22nd District, J. WILLIAM LINCOLN, Senator, 32nd District, LEONARD J. BODACK, Senator, 38th District, MICHAEL A. O'PAKE, Senator, 11th District, PATRICK J. STAPLETON, Senator, 41st District, JEANETTE F. REIBMAN, Senator, 18th District, VINCENT J. FUMO, Senator, 1st District, and H. CRAIG LEWIS, Senator, 6th District, individually and in their official capacities,

Plaintiffs,

vs.

BRENDA K. MITCHELL, Acting Secretary of the Commonwealth, and WILLIAM BOEHM, Commissioner of the Bureau of Commissions, Elections, and Legislation, Department of State, in their official capacities only,

Defendants.

STIPULATION

Pursuant to this Court's order of January 29, 1992, that provided, *inter alia*, that the parties should attempt to stipulate, to the extent possible, to the facts of this case, the Plaintiffs and the Defendants hereby stipulate as follows:

1. The Plaintiff Robert J. Mellow is a citizen of the United States and the Commonwealth of Pennsylvania and a resident and a registered voter in the Tenth Congressional District of Pennsylvania. Plaintiff Mellow serves as the State Senator from the Twenty-second Sen-

atorial District and is the Democratic Leader of the Senate of Pennsylvania, and is bringing this action in his individual and official capacities.

2. The Plaintiff J. William Lincoln is a citizen of the United States and the Commonwealth of Pennsylvania and a resident and a registered voter in the Twenty-second Congressional District of Pennsylvania. Plaintiff Lincoln serves as the State Senator from the Thirty-second Senatorial District and is the Democratic Whip of the Senate of Pennsylvania, and is bringing this action in his individual and official capacities.

3. The Plaintiff Leonard J. Bodack is a citizen of the United States and the Commonwealth of Pennsylvania and a resident and a registered voter in the Fourteenth Congressional District of Pennsylvania. Plaintiff Bodack serves as the State Senator from the Thirty-eighth Senatorial District and is the Democratic Chairman of the Senate of Pennsylvania, and is bringing this action in his individual and official capacities.

4. The Plaintiff Michael A. O'Pake is a citizen of the United States and the Commonwealth of Pennsylvania and a resident and a registered voter in the Sixth Congressional District of Pennsylvania. Plaintiff O'Pake serves as the State Senator from the Eleventh Senatorial District and is the Democratic Causus Secretary of the Senate of Pennsylvania, and is bringing this action in his individual and official capacities.

5. The Plaintiff Patrick J. Stapleton is a citizen of the United States and the Commonwealth of Pennsylvania and a resident and a registered voter in the Fourth Congressional District of Pennsylvania. Plaintiff Stapleton serves as the State Senator from the Forty-first Senatorial District and is the Democratic Policy Committee Chairman of the Senate of Pennsylvania, and is bringing this action in his individual and official capacities.

6. The Plaintiff Jeanette F. Reibman is a citizen of the United States and the Commonwealth of Pennsylvania and a resident and a registered voter in the Fifteenth Congressional District of Pennsylvania. Plaintiff Reibman serves as the State Senator from the Eighteenth Senatorial District and is the Democratic Caucus Administrator of the Senate of Pennsylvania, and is bringing this action in her individual and official capacities.

7. The Plaintiff Vincent J. Fumo is a citizen of the United States and the Commonwealth of Pennsylvania and a resident and a registered voter in the Frist Congressional District of Pennsylvania. Plaintiff Fumo serves as the State Senator from the First Senatorial District and is the Democratic Appropriations Chairman of the Senate of Pennsylvania, and is bringing this action in his individual and official capacities.

8. The Plaintiff H. Craig Lewis is a citizen of the United States and the Commonwealth of Pennsylvania and a resident and a registered voter in the Eighth Congressional District of Pennsylvania. Plaintiff Lewis serves as the State Senator from the Sixth Senatorial District and is the Democratic Judiciary Committee Chairman of the Senate of Pennsylvania, and is bringing this action in his individual and official capacities.

9. The Defendant Brenda K. Mitchell is a citizen of the United States and the Commonwealth of Pennsylvania and presently serves as Acting Secretary of the Commonwealth Department of State. The Defendant William Boehm is a citizen of the United States and the Commonwealth of Pennsylvania and presently serves as the Commissioner of the Bureau of Commissioner, Elections and Legislation, Department of State. By virtue of 25 P.S. § 2621 (Purdon's 1991), Defendants Mitchell and Boehm have the responsibility for administering the elections for United States Congress and for delegates to national party conventions for Pennsylvania. They are sued in their official capacities only.

10. In 1982, the Pennsylvania General Assembly enacted Article XVIII-A of the Pennsylvania Election Code, 25 P.S. § 3571-3573 (Purdon's Supp. 1991), which provides, *inter alia*, that "[f]or the purpose of electing representatives of the people of Pennsylvania to serve in the House of Representatives in the Congress of the United States, this Commonwealth shall be divided into 23 districts . . ." *See* 25 P.S. § 3571. The statute also set forth the boundaries of each of the 23 districts and the census units included in each. The districts created by this statute were virtually equal in population, as provided by the 1980 Federal decennial census, at the time the General Assembly enacted this statute.

11. In 1990, the Bureau of the Census of the United States conducted the decennial census. The population of Pennsylvania, as determined by said census, is 11,881,643. On about December 31, 1990, the Clerk of the United States House of Representatives issued a Certificate of Entitlement entitling Pennsylvania to only 21 congressional representatives, a loss of two representatives. The United States Constitution requires the Commonwealth to re-draw its congressional districts on the basis of the 1990 federal census in time for the 1992 elections.

12. According to the 1990 census data, the "ideal" population of a congressional district (*i.e.*, the population that each congressional district would have if all the districts had equal numbers of people) is calculated by dividing the total number of people in the Commonwealth (11,881,643) by the number of congressional districts (21). For Pennsylvania, the ideal district would have 565,793 people.

13. Exhibit A to the Complaint in this suit shows the population (according to the 1990 census data) of each of the congressional districts created by 25 P.S. § 3571, the amount by which the population of each such district varies from the ideal population, and the percentage by

which the population of each such district varies from the ideal population. The data set forth on Exhibit A are accurate to the best of the parties' knowledge, information, and belief.

14. The data on Exhibit A demonstrate that almost all the districts created by 25 P.S. § 3571 are no longer equal in population and now vary widely from the ideal figure. The Fourteenth Congressional District, for example, has only 453,279 people, which is 19.88% less than the ideal. By contrast, the Sixteenth Congressional District has 587,048 people, which is 3.73% more than the ideal. Thus, the maximum deviation between these two districts is 23.64%.

15. The schedule prescribed by the Pennsylvania Election Code for the 1992 congressional elections in Pennsylvania established January 28, 1992, as the first day that candidates for Congress (or for district level delegates to the Democratic or Republican National Conventions) could circulate nomination petitions. 25 P.S. § 2868 (Purdon's Supp. 1991) ("No nomination petition shall be circulated prior to the thirteenth Tuesday before the primary"). The deadline for filing such nomination petitions is February 18, 1992. *Id.* § 2873(d) ("All nomination petitions shall be filed on or before the tenth Tuesday prior to the primary"). The primary election is presently scheduled for April 28, 1992, *id.* § 2753(a) ("primary shall be held on the fourth Tuesday of April"); and the general election for November 3, 1992, *id.* § 2751 ("general election shall be held biennially on the Tuesday next following the first Monday of November").

16. As of January 29, 1992, the General Assembly had not passed a new congressional redistricting plan. The House of Representatives, which has a Democratic majority, has passed a congressional redistricting bill. The Senate, which has a Republican majority, has not acted on this bill or passed a bill of its own.

17. The boundaries of congressional districts must be fixed substantially in advance of the primary election presently scheduled for April 28, 1992, in order for that election to take place in timely fashion. The reason is that the Secretary of the Commonwealth, the 67 county Boards of Election within the Commonwealth, and the candidates themselves must take numerous steps to prepare for the holding of an election, and these steps are dependent on congressional districts having been drawn.

18. To begin with, under the election schedule that is currently in force, the period for candidates to circulate petitions for nomination began on January 28, 1992. Without district boundaries having been drawn, a candidate cannot know if his or her political supporters will be included in the district he or she seeks to represent. The candidate cannot even know if the citizens who sign his or her nomination petition are actually residents of that district. Therefore, candidates cannot reasonably begin circulating such petitions until they know the boundaries of the districts in which they will be running.

19. Also on January 28, 1992, the Secretary of the Commonwealth must notify the county Boards of Election of the offices to be filled in the primary. Because congressional district lines have not yet been drawn, the Secretary of the Commonwealth had to send out a notice that omitted congressional representatives and district level delegates to the Democratic and Republican National conventions and explained why these offices were not included in the notice.

20. Candidates have three weeks to circulate nomination petitions and obtain the necessary signatures. The deadline for filing such petitions with the Secretary of the Commonwealth is February 18, 1992. Once this deadline has passed, parties have seven days to file objections or challenges to the nominating petitions. These objections and challenges are heard by the Commonwealth Court, which by statute has fifteen days from February

18 to decide them. In addition, any decision by the Commonwealth Court is appealable, within 10 days, to the Supreme Court, which has no statutory deadline for making decisions.

21. On or before March 9, 1992, the Secretary of the Commonwealth must transmit to county Boards of Elections the names of candidates who have filed nominating petitions and who have not withdrawn or been declared disqualified. The purpose of this transmission is to enable the 67 county boards to mail write-in absentee ballots to military voters who are stationed in remote locations (e.g., Saudi Arabia). State law requires county boards to mail these ballots to such military voters no later than March 9, 1992. In addition, county boards are required by March 14, 1992, to mail absentee write-in ballots to all other military voters.

22. Once the challenges to the nomination petitions have been resolved by the courts, the Secretary of the Commonwealth must certify the names of the candidates and the order in which they will appear on the ballot to each of the 67 county Boards of Elections. Although there is no statutory deadline, as a practical matter, the Secretary must certify no later than six weeks before the primary.

23. If the Secretary sends out the certification later than March 17, all counties will have difficulty printing ballots and sending out absentee ballots in time for the primary. Late certification would be a particular problem for those counties that are spit between two or more congressional districts. There are presently at least 18 counties that are split in this manner.

24. Those counties that are split between one or more congressional districts must then determine which ballots should be sent to each of the numerous polling places within the county. This can be a particularly time-consuming task in Philadelphia and Allegheny Counties, both of which are split among several congressional dis-

tricts. Further complications arise if precincts are split between congressional districts, as sometimes occurs.

25. The county Boards of Elections then must print ballots and/or labels for voting machines, a process that can take several weeks to complete. In Philadelphia County, voting machines must be programmed as well. The Boards of Election then send the ballots or labels to various polling places within each county for use on the day of the election.

26. The primary scheduled for April 28, 1992, is a "unified" primary; that is to say, primary elections will be held on that date for Presidential and State legislative candidates as well as for congressional candidates. If congressional district lines are not drawn in time for the April 28, 1992, primary, the Commonwealth will be faced with the choice of either holding a separate primary for candidates for Congress and district level delegate positions or postponing the entire primary to some later date.

27. The first choice would be extremely expensive: it would cost $5-6 million to hold a separate primary. Moreover, a separate primary could not be held until at least two months after the April 28 primary. Counties are given 20 days by statute to certify the primary election results. Moreover, any challenges to the result of the April 28, 1992, primary have typically taken several weeks to resolve, and during this period voting machines and ballot boxes would have to be locked up. After the challenges were resolved, new ballots must be printed and voting machines re-programmed. Thus, by the time the second primary was held, it would be too late to elect convention delegates because the Democratic National Convention is held in July.

28. Postponing the entire primary would also create substantial problems. The Commonwealth has chosen to have an April primary in order to increase the amount

of influence that Pennsylvania voters will have on the outcome of the Presidential nominations. Delaying the primary will obviously lessen the influence.

29. In sum, it is imperative that a congressional districting plan be enacted and signed into law by the Governor as soon as possible if the April 28, 1992, primary is to be held on schedule.

Date: January 30, 1992

Respectfully submitted,

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TRANSCRIPT OF MASTER'S HEARING, VOLUME 1 AT 17-22

* * * *

THE COURT: Have I missed any statewide plan in getting this introduction?

MR. KRILL: Yes, Your Honor. John Krill for Senator Loeper and his co-intervenors.

Your Honor, we did file a plan that was the plan passed by the State Senate. We have brought with us this morning a corrected plan and map that we would like to offer to the Court for its consideration.

THE COURT: It's late. In fact, you didn't have any plan in by the 11th, did you?

MR. MacNETT: We had a plan. We did not submit the maps that—

THE COURT: That's why counsel is filing it.

MR. MacNETT: There was a legal description filed with the Court with our intervention.

THE COURT: Before the 11th?

MR. MacNETT: Yes, on the 11th.

MR. KRILL: But not a map, Your Honor.

THE COURT: Okay. Frankly, this would be the only exception I would make. Again, recognizing that there is a party or partisan aspect of this, I just want to make sure all viewpoints are represented.

What is the maximum on that plan?

MR. MOORE: Your Honor, for clarification, are they giving us numbers on the plan they submitted, complying with the Court's order, or are they giving us the number on the new plan they are now attempting to submit?

MR. MacNETT: The numbers I would propose to offer the Court would be on the plan amendment that we—

MR. MOORE: The plan they are attempting to submit after the deadline.

MR. MacNETT: That's correct.

THE COURT: Is this a correction of the plan that you submitted on the 11th, or is it a new plan?

MR. MACNETT: It is essentially the plan that we filed on the 11th, with some very minor fine tuning.

THE COURT: I'm being very liberal on this. Go ahead.

MR MOORE: Just for the record, we would object.

THE COURT: I will overrule that objection.

MR. MACNETT: The maximum amount of deviation in terms of gross population is 28 above and 26 below, for a range of 54.

THE COURT: By 54, I take it you mean .54 percent?

MR. MACNETT: I'm talking about individuals. We are dealing with raw numbers.

THE COURT: 54 persons.

MR. MACNETT: That's correct. The average deviation per person in the plan is 12.6 percent. I'm sorry. It's 12.6 persons.

THE COURT: The maximum is 54 and the average is 12.6.

MR. MACNETT: The range, Your Honor, is 54. The maximum from one direction is 28.

THE COURT: That's what we are defining maximum as.

MR. MACNETT: Right. I haven't reduced those to percentages. Obviously they are very, very tight, and we will submit those.

THE COURT: All you would do for the maximum, put 54 over the ideal.

MR. MACNETT: That's right. It's about one ten-thousandths.

THE COURT: Okay. Thank you.

MR. PACKMAN: Your Honor, just by way of comparison, just for the Court's edification, our proposed Plan 2 has a maximum deviation of 63 people, which calculates to .01 percent. So if they are at 54, I imagine they are at about .01 percent as well, just for the Court's information.

MR. MOORE: Your Honor, again by way of clarification. In our plans we computed the average devia-

tions: On Plan A, that average deviation is .0026 percent. On Plan B it is .0027 percent.

THE COURT: Give me that again. Average on Plan A is what?

MR. MOORE: Is .0026 percent. Plan B it is .0027 percent.

THE COURT: These are the Speaker's plans.

MR. MOORE: Correct.

MR. MURPHY: Your Honor, excuse me. Representative Ryan has a statewide plan that he's submitted also.

THE COURT: When was that submitted.

MR. MURPHY: Yesterday, Your Honor.

MR. HARVEY: That's the late one, Your Honor.

MR. MURPHY: Representative Ryan wanted to be able to present his plan to the Legislature before he presented it to the Court, and because of the lateness of the time the House of Representatives took up the reapportionment plan on the 11th, there was no opportunity to ask to intervene prior to yesterday.

MR. MOORE: Your Honor, the matter has already been determined by the Court. I asked that question on clarification. The Court advised that Mr. Ryan had intervened in time, had not submitted a plan, and the plan could not be submitted.

MR. PACKMAN: We would concur with that position, Your Honor.

THE COURT: There seems really no reason for the plan.

MR. MURPHY: We submitted a plan with our motion to intervene.

THE COURT: But after the 11th.

MR. MURPHY: Yes, sir.

THE COURT: I'm being liberal in allowing intervention, but I can't go along with adding that plan. Our order was plain to read. Just make life tough for this Court. I will sustain the motion excluding that plan.

You will be accorded the opportunity to support other plans or to cross-examine.

* * * *

TRANSCRIPT OF MASTER'S HEARING, VOLUME 2B AT 92-93

* * * *

Q [by Mr. Krill, petitioners' counsel] In the course of drafting your plan [the Loeper Plan], did you consult with Congressman Blackwell or with any of his staff?

A At one point, a gentleman's name I believe is Jim Davis, from Congressman Blackwell's staff, sat next to me one morning and we drew a second and a first congressional district that would appease Congressman Blackwell, and also one which they thought could garner support of enough members of the black caucus in the House of Representatives to pass House Bill 541 as an amendment.

* * * *

TRANSCRIPT OF MASTER'S HEARING, VOLUME 3 AT 25-34

* * * *

BY MR. MOORE:

Q Let's take District No. 1 [of the Loeper Plans]. Is the original population total for that district, is the population total for that district in the original plan 565,806?

THE COURT: Let me suggest, Mr. Moore, don't read every number to him. Tell him the districts you want and ask him for the numbers.

BY MR. MOORE:

Q What is the number you have for the first district in the amended plan?

A 565,820.

Q Is that not a net difference in the first district of 14 votes? I'm sorry. 14 people.

A May I qualify that?

Q I think you answered my question.

THE COURT: I think he's entitled to explain.

A As testimony yesterday indicated, the first and second districts were changed substantially. Only substantially for the minority populations. So of course that answer is going to be there are different changes in each of those districts.

BY MR. MOORE:

Q When you say changed substantially, do you mean a figure in the first district of something like 163,926 people?

A I mean a percentage that goes from 68-and-a-half percent black down to 65.8 percent black is what I mean.

Q Did you not in fact change the population total between the number of people removed and the number of people added in the first district for a total of 163,926 people?

A If that number is accurate, I will agree to it.

Q I'm not sure what that answer means.

THE COURT: I'm not sure what your question means. Now I will have to ask you to state the first population figure you stated for the original District 1.

MR. MOORE: Your Honor, we have been dealing with maximum deviation ranges which demonstrate the number of people below the ideal and number of people above. This figure 163,926 represents the number of people they moved out of the district plus the number of people they moved back into the district, for the total range, total change in that district. The total shift in population in that district.

THE COURT: What was the first population figure you stated that I asked you to not state again, 565 something for the original plan District 1? What was the figure.

MR. MOORE: 565,806. That was the population total in the first district in the original Loeper plan. The population total for the first district in the amended plan is 565,820. That shows a net difference of 14 people. However, when they moved from the original plan to the amended plan, they moved a total of 163,926 people.

THE COURT: Okay. Now I understand.

BY MR. MOORE:

Q Let's go to the second district.

MR. MOORE: I'm sorry. I forgot the manner in which Your Honor wants these asked. I'm asking him for the number.

THE COURT: Don't you repeat the numbers. Ask him for the numbers.

BY MR. MOORE:

What's the number there, sir, in the original plan?

A For?

Q Second district.

A 566,071.

Q What's the number in the amended plan for that district?

A 565,783.

Q Is that not a net difference reduction of 288 people?

A No. It's 270 people, I believe. I'm sorry. You are correct. It goes to a minus 9th deviation, that is correct.

Q Arriving at those numbers, did you not move, have a total population shift, of 153,196 people in the second district?

A If adding the 48th ward to the first district, the 29th ward, the 28th ward, the 11th ward and the 10th and 50th wards add up to that, I will agree to that.

Q Let's go to the third district. What is the population total for the third district in the original Loeper plan?

A 565,758.

Q In the amended plan?

A 565,782.

Q For a net difference, an increase of 24 people, correct?

A That is correct.

Q Arriving at that number, did you not shift the total population by 15,776 people in that district?

A If making the 18th ward whole in the third district and taking a couple additional precincts out of the 61st district and exchanging a precinct between the 3rd and 8th equal that, I will agree to that.

Q Let's go to the 4th district. What is the population total for the 4th district in the original plan?

A 565,695.

Q In the amended plan?

A 565,769.

Q For a net increase of 74 people, is that correct?

A Yes.

Q In the 4th district to arrive at that change, did you not move, have a total population shift in and out, of 19,974 people for that district?

A If those numbers are accurate, I did.

Q That district, by the way, is the Colter/Murphy district under your proposed plan, is that correct?

A That is this district on the Ohio border?

Q Yes.

A Yes.

Q Is your answer yes?

A If you are referring to this district on the Ohio border, the 4th, yes.

Q Let's go to the 5th district. What's your population total in the original plan for the 5th district?

A If I may for a second, I think we could speed this up, ask counsel if he has a sheet that has all of the districts and their population for one through 21 in the original plan.

MR. KRILL: No.

A The number is 565,888.

BY MR. MOORE:

Q And in the amended plan?

A 565,775.

Q For a net decrease of 113 people, correct?

A Correct.

Q Let's jump around a bit. I wanted to go through every one, but we will save a little time. Let's go to the 7th district.

What is your original population total in the first [sic] district?

A 565,481.

Q In the amended plan?

A 565,787.

Q For a net increase of 306 people?

A That is correct.

Q Let's go to 8. What's your population total in the original plan in the 8th district?

A 566,027.

Q And in the amended plan what is that figure?

A 565,772.

Q Is there not a net decrease of 255 people?

A Yes.

Q Let's jump to the 10th district. The 10th district, what is the population total for the original plan in that district?

A 566,199.

Q In the amended plan?

A 565,797.

Q For a net decrease of 402 people, is that correct?

A If that's the population of Shrewsbury Township in Lycoming County, that is correct.

MR. MOORE: I can continue through the list, Your Honor, but I will let the submission I think which they have made—I think the point's been made that the amended plan was a little bit more than that.

THE COURT: Were there any other districts that you want to highlight as involving a substantial shift?

MR. MOORE: Your Honor, we had a chance to compute the net population changes in the brief period of time we had. We cannot do that for every district. We could clearly do that very easily in Philadelphia. I can give you nets for every district, if you would like that, but in the interest of time—

THE COURT: I see.

MR. MURPHY: I do have two others we can touch upon.

BY MR. MOORE:

Q Let's go back to the 8th. In the 8th district we ended up with a net population decrease of 255 people, correct?

A Correct.

Q In arriving at that number in the 8th district, did you not shift 16,233 people? That would be in the Costmyer district.

A If by shifting a precinct in Bensalem from the 8th to the 3rd and two townships in Montgomery County out of the 8th to the 13th and taking another precinct from an already broken municipal, if that equals that population, that's correct.

Q In the 18th district what was the population total in your original plan?

A 565,444.

Q In the amended plan?

A 565,773.

Q For a net increase of 315 people. Did you not shift a—

A 315? No. Yes.

Q Thank you. I will try not to move so quickly, so you get a chance to answer.

Was the net shift in that case not 3,105 people?

A If that equals the loss of East Deer and the addition of two precincts in Kennedy Township, I believe that would be correct.

Q As I indicated, we didn't have a chance to compute all of the population totals, but just based upon the net shift that I have provided, does that not indicate that in moving from the Loeper plan as originally filed to the attempted amendment, did you not move something in excess of 372,210 people?

A I can't answer that question because I did not do an analysis between the two plans.

Q Would you like to have a chance to total the net total to determine that they do in fact equal 372,210, the figures you have already indicated or already agreed to as the total population shifts?

MR. KRILL: Your Honor, I'm going to object to that question as stating a fact that's not in evidence.

THE COURT: Yes, he did not specifically agree to the figures. He said I accept your arithmetic if it consists of specific geographical exchanges. I think it's not quite fair he had accepted the figures.

But your point is that if the shifts you have mentioned are added up, they total what, Mr. Moore?

MR. MOORE: They total 372,210.

THE COURT: That can be checked. I'm sure your arithmetic is okay.

BY MR. MOORE:

Q Again consulting the information you have available, will you please give us the range of high to low population in terms of raw numbers, number of people, in the original Loeper plan?

A I don't believe I have that. This will take some time. Unless counsel has it handy.

Q With the Court's indulgence, I think it's worth taking that time.

THE COURT: If they have percentages, it can be readily computed, because the base number, 565,793, remains the same.

BY MR. MOORE:

Q Do you have a number on the absolute overall range in terms of number of people in the original plan?

A Without going through district by district and writing down the lowest and highest, I couldn't tell you that, and that will take about ten minutes.

TRANSCRIPT OF MASTER'S HEARING, VOLUME 3 AT 138-39

* * * *

MR. MOORE: I would like to reinstate my objection to the admission of each of those documents. The testimony we have heard indicates there have been total population shifts between the first plan and second plan somewhere in excess of 327,000 people just in the districts we were able to quickly identify. A review of each of the population totals for the districts in that plan shows in every single district there are net population changes. Some districts they are as high as 300 people, one district it's as high as 400, and many of the districts it's in the hundreds. This is a different plan.

We have been told that the first plan was prepared in an effort to get some bipartisan support. In spite of the proponent's technical witness on this point, it is clear this plan would constitute a major shift in the political delegation. Currently there is a one vote republican edge in a 23-member delegation. We are going to lose two seats, we are going to a smaller delegation.

THE COURT: Are you now talking about Loeper 1 or Loeper amended? Original Loeper or amended Loeper?

MR. MOORE: The one vote edge is a current situation, it's our current delegation with 23 members. We are going down to 21, we are losing two, which is bad enough. Under the amended Loeper version, it is a likely possibility that there will be a three vote republican edge. That in itself is a significant change. On top of that is the fact that the delegation will change from 23 members to 21. That makes the impact of that three vote edge that much more significant. It cannot be argued that these are the same plans. This is a different plan.

THE COURT: I agree.

MR. MOORE: This is a second plan. But on top of that, it is a second plan which was not timely submitted.

THE COURT: I agree.

MR. MOORE: You are agreeing with me. I am on the record against the admission of untimely submitted plans. And in opposition to each one of those amendments.

* * * *

EXCERPTS FROM BRIEF FOR INTERVENORS,
F. JOSEPH LOEPER, ROBERT C. JUBELIRER,
D. MICHAEL FISHER, CHARLES LEMMOND,
HANK SALVATORE, NOAH WENGER
Dated February 21, 1992 at 33, 36

* * * *

e. The Loeper Plans correct a judicially recognized gerrymander, while the O'Donnell and McDade/Murtha Plans create gerrymandered districts.

The simple fact that Pennsylvania will have two less Congressmen after the redistricting necessitates some impact [on] existing congressional districts and incumbent congressmen.

* * * *

Both Loeper Plans merge portions of the 4th District with portions of the 22nd District. (Transcript, Vol. 2-B at 112). This merger corrects the gerrymander created by the current 4th District. (Transcript, Vol. 2-B at 112-13).

* * * *

[Appendix F]

PLAINTIFFS' PROPOSED PLAN 2

LEGISLATIVE DATA PROCESSING CENTER
PENNSYLVANIA PLACE MAP DISTRICT LISTING

Congressional District

District	1990 Adj Population Total	1990 Adj 18+/Race Total	White	Black	1990 Adj NHis 18+ White	Black	Am Ind	Rep	1990 Fall Reg Dem	Oth
C001	565,895	412,599	173,232	205,127	167,195	201,960	835	72,587	224,816	7,875
C002	565,815	439,169	169,542	256,269	167,023	254,637	1,123	51,137	252,273	10,744
C003	565,775	437,163	395,705	19,717	387,988	18,776	588	141,747	166,541	6,279

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF STATE

Cert. No. 92-4401

OFFICE OF THE SECRETARY OF THE COMMONWEALTH

Harrisburg, July 9, 1992

PENNSYLVANIA, ss:

I, Brenda K. Mitchell, DPA, *Secretary of the Commonwealth of Pennsylvania,*

DO HEREBY CERTIFY, That the attached is a true and correct copy of page 6 and page 27 of the April 28, 1992 Primary ballot certification report from Philadelphia County, Pennsylvania, as the same appears of record and remains on file in this office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the Seal of my Office to be affixed, the day and year above written.

BRENDA K. MITCHELL
Secretary of the Commonwealth

BUREAU OF ELECTIONS
1992 PRIMARY BALLOT CERTIFICATION REPORT
APRIL 28, 1992.

Philadelphia County (51)

Ballot Position and Election Result Section Part I

Office Positions Shall Appear on Voting Machine or Paper Ballot in Same Order as Listed

* * Democratic Primary * *				Insert Vote In Words:	Insert Vote In Digits:
Representative In Congress Vote for One				District 001	
Thomas M. Foglietta PO Box 40078 Philadelphia	19106-0000	County: Munic:	Philadelphia Ward 5 Div 3	Forty Five Thousand Fifty Eight	45,058
Representative In Congress Vote for One				District 002	
C. Delores Tucker 6700 Lincoln Dr. Philadelphia	19119-0000	County: Munic:	Philadelphia Ward 22, Div 5	Forty Thousand Thirty Three	40,033
Lucien E. Blackwell 235 S Melville St Philadelphia	19139-0000	County: Munic:	Philadelphia Ward 46	Forty Seven Thousand One Hundred Sixty Nine	47,169
Representative In Congress Vote for One				District 003	
Robert A. Borski PO Box 26846 Philadelphia	19134-0000	County: Munic:	Philadelphia Ward 65	Forty Nine Thousand Two Hundred Sixty Seven	49,267

BUREAU OF ELECTIONS
1992 PRIMARY BALLOT CERTIFICATION REPORT
APRIL 28, 1992.

Philadelphia County (51)

Ballot Position and Election Result Section Part I

Office Positions Shall Appear on Voting Machine or Paper Ballot In Same Order as Listed

* * Republican Primary * *

				Insert Vote In Words:	Insert Vote In Digits:
Representative In Congress				District 001	
Vote for One					
Craig Snyder P.O. Box 1944 Philadelphia	19105-0000	County: Munic:	Philadelphia Ward 5 Div 17	Five Thousand Six Hundred Sixteen	5,616
Representative In Congress				District 002	
Vote for One					
Larry Hollin 2036 Arch St Philadelphia	19103-0000	County: Munic:	Philadelphia Ward 8 Div 29	Seven Thousand Nine Hundred Ninety Nine	7,999
Representative In Congress				District 003	
Vote for One					
Charles F. Dougherty 2475 Grant Ave Philadelphia	19114-0000	County: Munic:	Philadelphia Ward 53 Div 17	Thirty One Thousand Six Hundred Fourteen	31,614